BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDWARD W. LUND)
      Claimant)
)
VS.)
)
KNIGHT TRANSPORTATION, INC.)
      Respondent)   Docket No. 1,019,840
      Self-Insured)

ORDER

Claimant appealed the January 11, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

Claimant is an over-the-road truck driver. This is a claim for injuries that resulted from a tractor trailer accident in Missouri on October 5, 2004. Judge Benedict found the claim was not compensable and denied claimant's request for preliminary benefits. Respondent did not appear at the January 5, 2005 preliminary hearing and thus respondent presented no defense to this claim. Nevertheless, Judge Benedict reasoned that the Kansas Workers Compensation Act did not apply because claimant was a self-employed independent contractor.

Accordingly, the issues before the Appeals Board (Board) on this appeal are:

1.   Is claimant an owner/operator as defined by K.S.A. 44-503 and/or K.S.A. 44-503c?

2.   As claimant was not injured in Kansas, was there a Kansas contract of hire?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent provided no evidence to contradict claimant's description of the accidental injury. The Board, therefore, finds claimant has proven that the accidental injury arose out of and in the course of his employment with respondent. The ALJ found Kansas jurisdiction based on a Kansas contract of hire.[1] The Appeals Board agrees.

K.S.A. 44-501(g) states in part:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both.

The primary issue for the Board to decide is whether claimant is an employee of respondent or an independent contractor. K.S.A. 44-503c(a)(1) excludes certain self-employed contractors from the definition of a worker. Although the ALJ did not mention this statute he did find claimant was an owner/operator. The "Independent Contractor Operating Agreement" that claimant signed with respondent required claimant to lease a tractor from one of respondent's affiliated companies.

> Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*[2]

Claimant's Independent Contractor Operating Agreement with respondent provides that respondent may deduct from funds payable to claimant sums for the purchase of workers compensation insurance. Claimant testified that this was in fact done. Claimant

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[1] *See* K.S.A. 44-505 and K.S.A. 44-506; *Neumer v. Yellow Freight System, Inc.*, 220 Kan. 607, Syl.¶ 2, 556 P.2d 202 (1976).

[2] K.S.A. 44-503c(a)(1).

also testified that following his accident, respondent provided him with authorized medical treatment and temporary total disability compensation. This is further evidence that supports the existence of workers compensation insurance that covers claimant.

The Kansas Supreme Court has considered instances where a claimant was a truck driver or owner-operator of a truck, contracting with companies whose business was to deliver goods throughout the United States. The Court has held the employer's right to control is an important element in determining what makes an employee or an independent contractor.[3]   However, there are many other elements which must be considered.

> The test for determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and whether the employer has the right to direct the manner in which the work is to be performed, as well as the result which is sought to be accomplished. [4]

The Board acknowledges that whether or not workers compensation insurance exists and, if so, the actual terms of the policy could be determinative of the issue. However, based upon the legislative mandate of K.S.A. 44-501(g) and the evidence presented to date, the Board finds that claimant was an employee of respondent on the date of accident. The amount of control exercised by respondent and the level of supervision by respondent over the work of the claimant satisfies the right of control test set forth in *Anderson* and *Knoble.*

WHEREFORE, the January 11, 2005 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict is reversed and this matter is remanded to the Administrative Law Judge for further orders consistent herewith on claimant's request for additional medical treatment and temporary total disability compensation.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

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BOARD MEMBER

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[3] *See e.g. Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 198, 558 P.2d 146 (1976); *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[4] *Anderson, supra*, at 198.

c: Roger D. Fincher, Attorney for Claimant
        Edwin M. Soltz, Attorney for Respondent
        Bryce D. Benedict, Administrative Law Judge
        Paula S. Greathouse, Workers Compensation Director